



1 Harris was required to file his federal petition within one year of the later of two
2 occurrences: (1) the date on which the judgment became final by the conclusion of direct
3 review; or (2) the expiration of time available to seek direct review of the judgment. *See* 28
4 U.S.C. § 2244(d)(1)(A). Harris' conviction became final on December 1, 1999, the deadline
5 for filing a petition for review, *See Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999),
6 making his federal petition due on December 2, 2000. However, the time during which a
7 properly filed application for state post-conviction or other collateral review with respect to
8 the pertinent judgment or claim is pending is not counted toward any limitations period. *See*
9 28 U.S.C. § 2244(d)(2). Harris' notice of post-conviction relief filed on August 19, 1999
10 tolled the limitations period until June 26, 2003, when the court of appeals denied review of
11 his petition for review. *See Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). Absent any
12 further tolling, Harris then had until June 27, 2004 to file his federal petition. His petition
13 was filed on July 20, 2004, 23 days after the June 27, 2004 deadline.¹ He has not shown any
14 extraordinary circumstances beyond his control which made it impossible for him to timely
15 file. *See Green v. White*, 223 F.3d 1001, 1003 (9th Cir. 2000).

16 Citing *Bowen v. Roe*, Harris argues in his reply that § 2244(d)(2) tolls the statute of
17 limitations for the 30-day period during which he could have filed a "petition for writ of
18 certiorari to the *Arizona Supreme Court*," following the court of appeals' denial of his petition
19 for post-conviction relief. However, the time limit during which he may file a petition for
20 review with the Arizona Supreme Court does not toll the 1-year limitations period under the
21 AEDPA. Under § 2244(d)(2), the statute is tolled only for the time during which a properly
22 filed application for post-conviction relief is "pending" within the meaning of that
23 subsection. It does not include the "time available for seeking such review," additional
24 language included *only* in § 2244(d)(1)(A), relied on in *Bowen v. Roe*, and limited to *direct*
25 *review* of state court convictions. *See White v. Klitzkie*, 281 F.3d 920, 924 (9th Cir. 2002).

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28 ¹The State's Answer sets forth the same deadline but erroneously states that the
petition was filed "389 days after the limitations period expired." Answer at p. 5.

IT IS THEREFORE RECOMMENDED that Anthony Harris' petition for writ of habeas corpus be **DENIED** and **DISMISSED WITH PREJUDICE** (Doc. #1).

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have ten days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See*, 28 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(e), Federal Rules of Civil Procedure. Thereafter, the parties have ten days within which to file a response to the objections. Failure timely to file objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the district court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. *See* Rule 72, Federal Rules of Civil Procedure.

DATED this 10 day of Dec., 2004

David K. Duncan
United States Magistrate Judge